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No. 92-1067

In The

Supreme Court of the United States

October Term, 1992

STATE OF CONNECTICUT,

Petitioner,

v.

KARIN APARO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF OF PETITIONER

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I. THE QUESTION WHETHER COLLATERAL ESTOPPEL APPLIES TO THIS CASE WAS FULLY ADJUDICATED BY THE CONNECTICUT SUPREME COURT AND IS PROPERLY BEFORE THIS COURT

The respondent erroneously argues that the petitioner is precluded from raising in this Court the question whether collateral estoppel applies in the acquittal-deadlock-retrial scenario, even though, as respondent concedes, the Connecticut Supreme Court decided the question on the merits. *See*, Respondent's Brief in Opposition at 7.

Contrary to the respondent's argument, the "not pressed or passed upon" rule, explicated in *Illinois v. Gates, 462 U.S. 213 (1983)*, does not require denial or dismissal of the petitioner's claim. In *Gates*, this Court declined to consider whether there was a good faith exception to the exclusionary rule, because that issue had never been raised by the state, nor had any of the state courts through which the case had passed ever considered the question.

In the instant case, by contrast, the Connecticut Supreme court fully adjudicated the question whether collateral estoppel applies in the acquittal-deadlock-retrial scenario.

> [W]e must decide, first, whether *Ashe v. Swenson, [397 U.S. 436 (1970)]*, applies when a jury acquits on one

> count of a multicount indictment and does not reach a verdict on another count. . . . *Ashe* involved two successive proceedings against the defendant, whereas here jeopardy continues to attach from the first trial . . . and the jury could permissibly have returned inconsistent verdicts in the first trial. . . . It may, therefore, be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues, it is arguable that the second trial is not a "future lawsuit" for *Ashe* purposes. The United States Supreme Court has not addressed this issue, and it is a question of first impression for this court.

State v. Aparo, 223 Conn. 384, 391 (1992) (internal citations omitted); *see*, Appendix To Petition at 8A. The Court then rejected the inconsistent verdict and continuing jeopardy arguments against applying collateral estoppel, and the state court held that collateral estoppel did apply in the acquittal-deadlock-retrial situation. id. at 392-93; Appendix to Petition at 9A-10A. The state's motion seeking reargument and/or reconsideration of this holding was rejected. *See* Appendix to Reply Brief.

Even if this Court concludes that the petitioner's first issue was not fully preserved below, it should still grant certification on that claim.

In *Gates*, this Court identified four reasons for not considering an unpreserved question: (1) the record was

not adequately developed on the factual issue presented; (2) the state courts had not had the opportunity to consider the federal constitutional issue in the first instance; (3) the state courts had not had the opportunity to consider the question under the state constitution; and (4) the adoption of a good faith exception would modify important precedent imposing the exclusionary rule. *Illinois v. Gates*, 462 U.S. at 221-22. None of these reasons applies to preclude this Court's review in the instant case.

First, the issue is a question of law and the Connecticut Supreme Court obviously found the record fully adequate when it adjudicated the question. Second, the state supreme court had the opportunity to and did decide the federal constitutional question on the merits. *See State v. Aparo*, 223 Conn. at 389-90 (discussing federal case law regarding the applicability of *Ashe v. Swenson)*; Appendix to Petition at 6A-7A.

Third, the Connecticut Supreme Court had the opportunity to consider the question under the state constitution. It did not do so, probably because no state constitutional ground was ever raised in this case, and because Connecticut's constitution does not contain a double jeopardy clause where principles of collateral

estoppel would be located.[1] Finally, resolution of the issue by this Court would not modify any existing precedent.

As the foregoing discussion demonstrates, none of the purposes of the "pressed or passed on" rule is implicated in this case. The petitioner's first issue is properly before this Court on petition for review.

II. CONTRARY TO RESPONDENT'S REPRESENTATION, THE CONNECTICUT SUPREME COURT DID NOT PRECLUDE ON RETRIAL EVIDENCE OF INTENT TO KILL, BUT RATHER BARRED RE-USE OF EVIDENCE THAT THE DEFENDANT DID AN ACCESSORIAL ACT

On page 24 of the brief in opposition, the respondent inaccurately states that "the Connecticut Supreme Court correctly determined that the petitioner may not present the same evidence on intent to commit murder" because the jury had found "reasonable doubt as to that evidence." Intent to kill is an element common to the charges of accessory to commit murder and conspiracy to commit

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[1] The Connecticut Supreme Court has recognized that the due process guarantees of the Connecticut constitution include the double jeopardy protection recognized at common law. *State v. Rawls*, 198 Conn. 111, 113 n.3, 502 A.2d 374 (1985); *State v. Moeller*, 178 Conn. 67,77, 420 A.2d 1153, *cert. denied*, 444 A.2d 950 (1979); *Kohlfuss V. Warden*, 149 Conn. 692, 695, 183 A.2d 626, *cert. denied*, 371 U.S. 928 (1962). Nevertheless, no Connecticut case has recognized a double jeopardy protection under the state constitution that is distinct or different from the federal double jeopardy protection.

murder. *See State v. Aparo*, 223 Conn. at 401-402. The state supreme court rejected the respondent's claim that the element of intent to kill had been decided in her favor, but concluded that the jury could have found that she did not do the requisite accessorial act.

> [T]he jury could have reached the result it did if it believed every piece of that evidence except those parts of Coleman's testimony that directly indicated that the defendant had solicited, requested, commanded, importuned, or intentionally aided him in the murder of Joyce Aparo.

State v. Aparo, 223 Conn. at 384. The state court explicitly precluded the state from reusing only that evidence that proved the respondent's accessorial acts, not her intent to kill.[2] Assuming as it did, that collateral estoppel is applicable, the state court recognized that a finding that the respondent lacked the intent to kill would

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[2] The court explicitly singled out for preclusion evidence that the respondent first told Coleman on August 4 to kill her mother on August 5, after she (respondent) returned home, then later on the evening of August 4 changed the plan, asking him to commit the murder that night, as she did not want to be there when it happened. *State v. Aparo*, 223 at 409.

But on retrial of the conspiracy count, the jury will not have to determine whether the respondent's conduct constitutes an accessorial act, as accessorial conduct is not an element of conspiracy under Connecticut law. *See State v. Aparo*, 223 Conn. at 401-402; Appendix to Petition at 18A-19A. Therefore, as the state has argued in its petition, the evidence may be used to establish predicate facts on the conspiracy count. See, Petition at 18-21.

necessarily have wholly barred retrial, because intent to kill is an essential element of the conspiracy with which the respondent is charged.

RESPECTFULLY SUBMITTED,

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S.C. NO. 14443

STATE OF CONNECTICUT: SUPREME COURT

V. :

KARIN APARO : AUGUST 18, 1992

STATE'S MOTION FOR REARGUMENT AND/OR RECONSIDERATION

Pursuant to Practice Book §§4122 and 4123, the State of Connecticut respectfully moves for reargument and/or reconsideration of this Court's opinion in *State v. Aparo*, 223 Conn. 384 (1992); for the reasons set forth herein.

I. BRIEF HISTORY OF THE CASE

The defendant was arrested and charged by information with one count of murder as an accessory, in violation of General Statutes §§53a-54a(a) and 53a-8; and one count of conspiracy to commit murder, in violation of §§53a-54a(a) and 53a- 48(a). A jury found the defendant not guilty on the accessory to murder count, but was unable to reach a verdict on the conspiracy count. The trial court (Corrigan, J.) then entered a judgment of acquittal on the

murder count and declared a mistrial on the conspiracy count.

After the state indicated its intent to retry the defendant on the mistried conspiracy count, the defendant filed a motion to dismiss the case, claiming, *inter alia*, that principles of double jeopardy and collateral estoppel precluded any retrial. The trial court (Damiani, J.) rejected these claims and denied the motion to dismiss. The defendant then filed an interlocutory appeal.

In a decision issued on August 11, 1992, this Court held that retrial was not barred by double jeopardy or collateral estoppel. *State v. Aparo*, 223 Conn. at 387-88, 401-04. After a thorough review of the evidence offered at the first trial, this Court rejected the defendant's claim that the jury, in acquitting the defendant on the accessory charge, necessarily found that she did not possess the requisite intent to kill her mother. This Court concluded instead that the jury may have had a reasonable doubt as to whether she had committed the accessorial act of solici-

ting, requesting, importuning or intentionally aiding Coleman to cause her mother's death. *Id.* at 403-04. The Court pointed out the reasons why the jury may not have fully credited Coleman's version of events. *Id.* at 403. "The jury therefore might, for example, have decided to believe only those portions of [Coleman's] testimony that were corroborated by [state's witnesses] DuBois and Smith, both of whom testified that the defendant had admitted discussing the murder with Coleman shortly before he killed Joyce Aparo, but neither of whom testified that the defendant had requested Coleman to do so." *Id.* at 404.

The court also held, however, that collateral estoppel could preclude the use at retrial of certain evidence or facts decided in the defendant's favor at the first trial. Thus, the Court concluded, upon retrial the trial court must exclude evidence used in the first trial if (1) the defendant can demonstrate that the jury, in acquitting her on the accessory charge, harbored a reasonable doubt as to the fact sought to be proven by that evidence; and (2)

the proffered fact, if proven, would establish an element of the offense of conspiracy. *See Id.* at 410-11. The Court expressly held that, upon retrial, "the state may not use Dennis Coleman's testimony that the defendant requested, on the night before the murder took place, that Coleman kill her mother." *Id.* at 410. The Court reasoned that the jury must have disbelieved Coleman's uncorroborated testimony that, in a phone conversation on the evening of August 4, the defendant had asked him to kill her mother. No other witness had corroborated Coleman on this point, and the defendant had expressly denied it.

II. SPECIFIC FACTS AND LEGAL ARGUMENTS IN SUPPORT OF THIS MOTION

A. The Doctrine Of Collateral Estoppel Is Limited, Like Its Parent Double Jeopardy, To Successive Prosecutions, And Has No Application To Cases of Continuing Jeopardy

This Court noted that the United States Supreme Court has not yet decided whether collateral estoppel applies in cases such as the present one, where a jury has

acquitted the defendant on one count but failed to reach a verdict on the other count. The seminal case, *Ashe v. Swenson*, 397 U.S. 436 (1970), involved successive prosecutions, and its holding is limited to attempts to relitigate legal issues in "future" lawsuits. *Dowling v. United States*, 493 U.S. 342 (1990).

> It may [ ] be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues [to attach from the first trial through the second trial], it is arguable that the second trial is not a "future lawsuit" for Ashe purposes.

State v. Aparo, 223 Conn. at 391. This Court, held, nevertheless, that collateral estoppel does apply in the context of the present case. *Id.* at 391-92.

This Court should reconsider this point. Although the United States Supreme Court has not yet expressly decided the issue, its opinion in *Ohio v. Johnson*, 467 U.S. 493 (1984), casts serious doubt on this Court's holding. In

that case the Court rejected the defendant's claim that under *Ashe v. Swenson*, his guilty plea to one count of a multicount indictment barred the state from trying him on the remaining counts. The Court held that *Ashe* was inapplicable, because the taking of a guilty plea wa not the same as a trial on the merits. In *dicta* the Court also said, "[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." 467 U.S. at 500 n.9.

It is evident from this quoted statement that the United States Supreme Court never intended *Ashe* to apply to cases such as the present one, where the state tried both counts simultaneously and jeopardy continues to attach from the first trial. *See United States v. Farmer*, 923 F.2d 1557, 1563 n.12 (11th Cir. 1991) (questioning whether collateral estoppel even applies in cases of continuing jeopardy); *Butler v. Maryland*, 605 A.2d 186, 202 n.13 (Md.

1992) (same); *see also United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976) (declining to decide whether collateral estoppel applies to retrials of multicount indictments).

This limitation on the use of collateral estoppel is consistent with the constitutional principles of double jeopardy. Double jeopardy by its terms applies only where original jeopardy has been terminated. *Price v. Georgia*, 398 U.S. 323, 329 (1970). Collateral estoppel, which is after all a component of double jeopardy and derives its constitutional significance therefrom, should not apply where the right against double jeopardy is not even implicated because of continuing jeopardy. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) (failure of jury to reach verdict is not event terminating jeopardy; double jeopardy does not prevent retrial regardless of sufficiency of evidence on mistried count at first trial).

The continuing jeopardy situation is analogous to a case where a defendant is acquitted on the greater charge

but convicted of a lesser included offense. If that conviction is overturned on appeal, the state may retry the defendant on the lesser offense, even though the acquittal on the greater charge bars retrial on that count. *Price v. Georgia*, *supra*. At such a retrial after reversal on appeal, the state would not be barred from reusing any evidence relevant to the retried count, even though it had also been used at the first trial to prove the acquitted count.

In holding that collateral estoppel applied in the continuing jeopardy situation, this Court relied heavily on *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979), which is of questionable validity for two reasons.

First, *Mespoulede* was decided prior to *Ohio v. Johnson* and *Richardson v. United States.* In light of these more recent decisions, its conclusion that collateral estoppel should apply in the continuing jeopardy situation deserves reconsideration.

Second, *Mespoulede* erroneously holds that collateral estoppel may bar relitigation of any evidentiary facts introduced at the first trial; 597 F.2d at 334; a concept soundly rejected by the United States Supreme Court in *Dowling*, which refused to extend *Ashe* to exclude, in all circumstances, use of relevant and probative evidence simply because it relates to prior acquitted conduct.

B. This Court Construed Collateral Estoppel Too Broadly When It Held That The Doctrine May Preclude The State From Using Evidence That The Defendant Asked Coleman To Kill Her Mother, Where Upon Retrial That Evidence Alone Will Not Determine An Element Of The Conspiracy Count

The United States Supreme Court has not yet decided whether the doctrine of collateral estoppel includes an evidentiary estoppel component, to prevent the state from reusing evidence at a retrial, where the first trial resulted in an acquittal and a deadlock on related counts. Neither *Ashe v. Swenson*, *supra*, nor *Dowling v. United States*, *supra*, expressly controls, as both of those

cases involved successive prosecutions, not retrial of a mistried count after an acquittal and deadlock on related counts.[1] Even if evidentiary estoppel may apply in a case of continuing jeopardy, it has no application in the present case. In *Ashe*, the Court held that the second prosecution was barred because the state sought to relitigate the same *legal issue*, i.e. identity, that the first trial had resolved in the defendant's favor. *Ashe* does not preclude the use of prior acquitted conduct where the prior acquitted conduct "did not determine an ultimate issue in the *present* case." *Dowling v. United States*, 110 S.Ct. at 672 (emphasis supplied).

"Collateral estoppel prevents the use of the prior acquitted conduct only if *the legal or federal issue regarding the conduct is identical* to the issue in the first trial *and* was decided in the defendant's favor." *United States v.*

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[1] Even in the successive prosecution context, an overlap of proof does not bar successive trials of a conspiracy and the underlying substantive crime. *United States v. Felix*, ___ U.S. ___, 112 S.Ct. 1377 (1992).

Davis, 809 F.2d at 1206 (citations omitted) (first emphasis supplied, second emphasis in original); *United States v. DeVincent*, 632 F.2d 155, 158-59 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) (defendant did not show that acquittal on first count involved determination of any element of second mistried count). "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." *Grady v. Corbin*, 110 S.Ct. 2084 (1990).

Where the element resolved in the defendant's favor at the first trial is only an evidentiary fact at the second trial, collateral estoppel will not bar its reuse. Dowling v. *United States*, *supra*; *Flittie v. Solem*, 751 F.2d 967, 972 (8th Cir. 1985), cert. denied, 475 U.S. 1025 (1986); *see* Note, "Collateral Estoppel Effect of Prior Acquittals," 46 Brooklyn L.Rev. 781, 788-90 (1980).

While this Court purported to recognize these principles, it nevertheless afforded an overly expansive inter-

pretation of Ashe to bar not only the relitigation of ultimate facts, but also to foreclose the introduction of evidentiary facts which the Court deemed necessarily established in the defendant's favor at the first trial.

In the present case, the state will not have to prove on retrial that the defendant acted as an accessory in order to prove conspiracy to commit murder. While the evidence that the defendant asked Coleman to kill her mother was an ultimate fact in the first trial on the accessory count, in that it could have proved, without more, the accessorial act (that she solicited or requested that he kill the victim), it will not be an ultimate fact at the retrial of the conspiracy count. Accordingly, the state will not be relitigating an ultimate fact, or the same legal issue, i.e., solicitation or request as an accessorial act.

Standing alone, the fact that the defendant asked Coleman to kill her mother proves neither an unlawful agreement nor any other essential element or "ultimate fact" of the crime of conspiracy. Viewed in context with

other evidence, however, it may permit the jury to infer the defendant's participation in a conspiratorial agreement, or to infer that she possessed the requisite intent to kill her mother. Thus at the second trial the evidence that the defendant asked Coleman to kill her mother will be an evidentiary fact that merely tends to prove, when considered with other evidence, the element of agreement or intent on the conspiracy count.[2]

Courts in other jurisdictions have refused to apply collateral estoppel to preclude the re-use of evidence relevant to both counts at the first trial, where proof of an element on the retried charge will not depend solely on the prior acquitted conduct. *See, e.g., United States v. Farmer,* 923 F.2d at 1564 and n. 16; *United States v. Dray*, 901 F.2d 1132, 1138 (1st Cir. 1990); *United States v. Davis*, 809

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[2] As this Court recognized, "[e]vidence of predicate facts, rather than ultimate facts, need not be proven beyond a reasonable doubt and is, therefore, not barred by collateral estoppel." *State v. Aparo*, 223 Conn. at 407.

F.2d 1194, 1206 (6th Cir. 1987); *Flittie v. Solem*, 751 F.2d at 972.

The test formulated by this Court for determining whether evidence may be reused on retrial is too restrictive and almost impossible to apply. The Court in the present case has wholly failed to consider that the evidence of the defendant's conduct offered at the first trial was relevant to both counts and was inextricably intertwined. All of the evidence admitted at the defendant's first trial had independent significance on each count, and none of it related solely to the acquitted charge. It is not possible to tease out, with any degree of certainty, which evidentiary facts supported the accessory count alone. *See Grady v. Corbin*, *supra* (rejecting same evidence test); *Dowling v. United States*, 493 U.S. at 348 (refusing to extend Ashe to exclude, in all circumstances, relevant and probative evidence simply because it relates to acquitted conduct); *United States v. Farmer*, 923 F.2d at 1524 ("immaterial" that prosecution had in earlier trial

used same evidence to prove element of count on which jury acquitted defendant).

Alternatively, this Court should revise its opinion to expressly state that, on remand, the trial court should exclude only that evidence that the defendant can show went solely to the acquitted charge of accessory to murder. *See In re Juvenile Appeal (83-DE)*, 190 Conn. 310 (1983) (collateral estoppel does not require blanket preclusion of all evidence, without regard to whether it was relevant solely to an issue necessarily decided by prior judgment).

III. LEGAL GROUNDS RELIED UPON

The state relies on Practice Book §§4122 and 4123 in support of this motion.

Respectfully submitted,
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CERTIFICATION

I hereby certify that a copy of this motion was mailed to Hubert Santos, Esquire and Hope Seeley, Esquire, Santos, Peck, & Smith, P.C., 51 Russ Street, Hartford, CT 06106 on August 18, 1992.

/s/ Judith Rossi
JUDITH ROSSI
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S.C. NO. 14443

STATE OF CONNECTICUT: SUPREME COURT

V. :

KARIN APARO : AUGUST 18, 1992

ORDER

THE MOTION OF THE STATE OF CONNECTICUT, FILED AUGUST 19, 1992, FOR RE-ARGUMENT AND/OR RECONSIDERATION HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT

/s/ Francis J. Drumm
Chief Clerk

NOTICE SENT; 9/18/92
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CLERK, HARTFORD J.D.
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REPORTER OF JUDICIAL DECISIONS